Supreme Court U.S.
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No. 15-797

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

v.

TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the constitutional guarantees the Eighth Amendment protects are respected, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari in this case presents an important question about whether, consistent with the protections of the Eighth Amendment, an individual may be forced to endure more than three decades on death row, almost half of that time spent living in highly isolated conditions. In this case, Petitioner Bobby James Moore, who was sentenced to death at the age of 20, has spent more than 35 years living on death row, nearly 15 of them (since April 2001) almost continually in "administra-

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus's* intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

tive segregation," which means he spends more than 22 hours per day alone in his prison cell.

As the Petition demonstrates, "[f]orcing a prisoner to endure decades on death row raises profound constitutional concerns." Pet. 11, 28-33. The Petition sets out three reasons why Moore's case "presents an especially compelling vehicle in which to" address those constitutional concerns: (1) he has been forced to spend an exceptionally long period on death row, (2) his extended confinement on death row is due to "very substantial constitutional claims"; and (3) so much of his time on death row has been spent living in highly isolated conditions. *Id.* at 33-34. This brief in support of the Petition focuses on the third of those reasons and explains why, as the Petition puts it, "[t]he constitutional problems with excessively long periods" on death row "are severely aggravated where, as here (and as is common in death-penalty states), a prisoner on death row is kept alone in his cell for almost the entire day." Pet. 30; *see also* Am. Civil Liberties Union, *A Death Before Dying: Solitary Confinement on Death Row* 2 (2013), https://www.aclu.org/files/assets/deathbeforedying-report.pdf ("Most death row prisoners in the United States are locked alone in small cells for 22 to 24 hours a day . . . .").

The Eighth Amendment to the U.S. Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. As this Court has long recognized, "[t]he final clause [of the Amendment] prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Solem v. Helm*, 463 U.S. 277, 284 (1983); *Weems v. United States*, 217 U.S. 349, 367 (1910) ("it is a precept of justice that punishment for

crime should be graduated and proportioned to the offense").

This prohibition on excessive punishment has its roots in the English common law. The Magna Carta, for example, included three chapters that "addressed the problem of excessive" punishments. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishment Clause*, 97 Va. L. Rev. 899, 929, 928 (2011). The English Bill of Rights also embraced this principle of proportionality, using language undeniably similar to the language included in the Eighth Amendment: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." English Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, *available at English Bill of Rights 1689*, Yale L. Sch. Library, http://avalon.law.yale.edu/17th_century/england.asp (last visited July 24, 2015). The Framers viewed this principle of proportionality as a critical part of our common law heritage and thus incorporated it into the Eighth Amendment. Stinneford, *supra*, at 943-44.

Reflecting this history, this Court has repeatedly recognized that "[t]he Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). Long-term placement in solitary confinement violates this proscription because, as numerous studies have shown, the psychological damage caused by long-term solitary confinement is incredibly severe—so severe, in fact, as to be excessive with respect to virtually all prisoners. *Cf. Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring)

("[t]he human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators"). The psychological damage caused by such an extended stay in solitary confinement makes all the more cruel the execution of an individual who has been so confined. Thus, the fact that Moore has spent almost all of the last fifteen years in solitary confinement provides all the more reason for this Court to use this case to consider the important Eighth Amendment questions raised by extended confinement on death row.

Amicus urges the Court to grant certiorari and hold that an excessive period of confinement after being sentenced to death, especially when that time is spent in solitary confinement, violates the Eighth Amendment prohibition on cruel and unusual punishment.

ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT EXCESSIVE PERIODS OF CONFINEMENT PRIOR TO EXECUTION, ESPECIALLY WHEN SPENT IN SOLITARY CONFINEMENT, VIOLATE THE EIGHTH AMENDMENT

A. The Eighth Amendment's Ban On "Cruel and Unusual" Punishment Proscribes Excessive Punishment

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. As this Court has long recognized, the Eighth Amendment prohibits punishments that are not only barbaric, but also excessive. *See, e.g.*, Stinneford, *supra*, at 910 ("The

Supreme Court has held for the past century that the Cruel and Unusual Punishments Clause prohibits excessive punishments as well as barbaric ones."); *see also Helm*, 463 U.S. at 284 ("The final clause [of the Eighth Amendment] prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."

This prohibition on excessive punishment has ancient roots. As one scholar has noted, "[t]he idea that the punishment should fit the crime is as old as Western civilization," and it is "a longstanding theme in the English common law tradition." Stinneford, *supra*, at 927; *see id.* at 931 ("William Bracton, whose work *On the Laws and Customs of England* was the most comprehensive treatment of English law before Blackstone, wrote: 'It is the duty of the judge to impose a sentence no more and no less severe than the case demands.'" (quoting 2 William Bracton, *On the Laws and Customs of England* 299 (Samuel E. Thorne trans., Harvard Univ. Press 1968) (1300))); 4 William Blackstone, *Commentaries on the Laws of England* 17 (1769) ("It is . . . absurd and impolitic to apply the same punishment to crimes of different malignity."). Indeed, "[w]hat differentiates the English (and later the American) legal tradition from that of other societies is that the principle of proportionality in sentencing . . . . was embodied in documents meant to impose such limits: Magna Carta, the English Bill of Rights, and the United States Constitution." Stinneford, *supra*, at 928.

The Magna Carta, for example, included three chapters that "addressed the problem of excessive amercements," the demands that the King would impose on individuals who committed a criminal offense. *Id.* at 929, 928. Chapter 20 provided that "[f]or a trivial offence, a free man shall be fined only

in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood," Magna Carta of 1215, *available at English Translation of Magna Carta*, The British Library, http://www.bl.uk/magna-carta/articles/magna-carta-english-translation (last visited July 24, 2015), while chapters 21 and 22 provided that earls, barons, and clergy "shall be fined only . . . in proportion to the gravity of their offence." *Id.*; *see* Stinneford, *supra*, at 930 (explaining that the Magna Carta prohibitions were "not mere words" because "[s]ome evidence suggests that in the thirteenth and fourteenth centuries, the proscription against excessive amercements was enforced through the writ de moderata misericordia"). This "principle of proportionality also appears to have been considered applicable to cases involving sentences of imprisonment, although this form of punishment was rare prior to the eighteenth century." *Id.* at 931.

This same principle of proportionality was reflected in the English Bill of Rights, which imposed a limitation on the English sovereign in language strikingly similar to that eventually included in the Eighth Amendment: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." English Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, *available at English Bill of Rights 1689*, *supra*; *see* Stinneford, *supra*, at 932-37 (discussing cases in which the British Parliament assessed the legality of sentences by considering whether they were excessive to the crime committed).

Thus, when the Framers of the Eighth Amendment incorporated the "cruel and unusual punishments" prohibition in our national charter, they were

acting against the backdrop of the long-established meaning of those terms. *See* Stinneford, *supra*, at 939 (noting that "[t]he phrase 'cruel and unusual' was consistently used as a synonym for 'excessive' in two major areas of law outside of criminal punishment"); *see also id.* at 939-42. And they incorporated this prohibition on "cruel and unusual punishments," including those that are excessive in relation to the crime committed, because they viewed that prohibition as a fundamental part of their common law heritage and the Bill of Rights as their means of ensuring that the federal government would respect that common law heritage. *Id.* at 943-44.

Reflecting this history, this Court has repeatedly recognized that "[t]he Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller*, 132 S. Ct. at 2463 (quoting *Roper*, 543 U.S. at 560). As this Court has explained, this right "flows from the basic '"precept of justice that punishment for crime should be graduated and proportioned to [the] offense."'" *Roper*, 543 U.S. at 560 (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)). Moreover, by extending this protection even to "those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Id.* As the next Section explains, long-term placement in solitary confinement violates that fundamental constitutional requirement.

B. Long-Term Solitary Confinement Violates the Eighth Amendment's Prohibition on Excessive Punishment

Long-term placement in solitary confinement violates the Eighth Amendment's proscription on "cruel and unusual punishment" because long-term place-

ment in such restrictive and dehumanizing conditions is likely excessive with respect to virtually all inmates, even those who commit capital offenses.[2] As Justice Kennedy noted just last Term, "[t]he human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators." *Ayala*, 135 S. Ct. at 2209 (Kennedy, J., concurring); *see id.* at 2210 ("research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price"); *see also In re Medley*, 134 U.S. 160, 170 (1890) (solitary confinement carries "'a further terror and peculiar mark of infamy'").

In fact, numerous studies have documented the severe psychological strain that solitary confinement imposes. As one expert in the field has explained, "[t]he restriction of environmental stimulation and social isolation associated with confinement in solitary are strikingly toxic to mental functioning," producing "florid delirium—a confusional psychosis" in some inmates. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. & Pol'y 325,

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[2] Although this brief argues that long-term solitary confinement violates the Eighth Amendment because it is likely excessive with respect to virtually all inmates, *amicus* notes that such long-term solitary confinement might also constitute barbarous treatment and be prohibited by the Eighth Amendment for that reason, as well. *See, e.g.*, John F. Cockrell, *Solitary Confinement: The Law Today and the Way Forward*, 37 Law & Psychol. Rev. 211, 213 (2013) ("Given the symptoms associated with solitary confinement, the word 'torture' may not be an inappropriate description of the conditions imposed."); Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. Pa. J. Const. L. 115, 122 (2008) ("International law also supports the proposition that very lengthy, virtually permanent conditions of harsh solitary confinement constitute either torture or cruel, inhuman, and degrading treatment.").

354 (2006); *see* Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. Psychiatry 1450, 1452 (1983) (describing how inmates often hallucinated, heard voices, and experienced "shortness of breath, panic, tremulousness, and dread of impending death"). Another has noted that "for some prisoners . . . solitary confinement precipitates a descent into madness." *Reassessing Solitary Confinement: The Human Rights, Fiscal and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights*, 112 Cong. 21 (2012) [hereinafter *Reassessing Solitary Confinement Hearing*].

Indeed, one study found that the conditions of solitary confinement were so severe and difficult that almost every prisoner living under such conditions attempted to commit suicide. *See* Amicus Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent, *Wilkinson v. Austin*, 545 U.S. 209 (2005), (No. 04-495), 2005 WL 539137, at *16 (2005) [hereinafter Psychology Amicus Brief] (citing Thomas B. Benjamin & Kenneth Lux, *Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine Prison*, 9 Clearinghouse Rev. 83-90 (1975)); *see generally In re Medley*, 134 U.S. at 168 (noting that after a short period in solitary confinement, "[a] considerable number of the prisoners fell . . . into a semi-fatuous condition . and others became violently insane; others still, committed suicide"). These accounts are not anomalous; as three psychiatrists put it, "[t]he overall consistency of these findings—the same or similar conclusions reached by different researchers examining different facilities, in different parts of the world, in different decades, using different research methods—is striking." Psy-

chology Amicus Brief, *supra*, at *22; *see* Lobel, *supra* note 2, at 118 ("'[n]o study of the effects of solitary . . . that lasted longer than 60 days failed to find evidence of negative psychological effects'" (quoting Psychology Amicus Brief, *supra*, at *4)).

It bears emphasis that "negative (sometimes severe) health effects can occur after only a few days of solitary confinement," and "[t]he health risk rises for each additional day in solitary confinement." Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Just. 441, 488-97 (2006); *see also* Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 Pace Int'l L. Rev. 1, 11-12 (2006) ("[T]he longer an individual experiences conditions of isolation, the likelier they are to develop significant mental illness."); Christine Rebman, Comment, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DePaul L. Rev. 567, 584 (1999) ("the longer the period of time an inmate remains in solitary confinement, the greater the risk that the inmate will need to seek psychiatric hospitalization"). It is no wonder then that the psychological consequences for those who are held in solitary confinement for years and years can be profoundly negative.

Nor is it surprising that long-term solitary confinement would produce such negative psychological effects. After all, solitary confinement denies prisoners the basic human need of social interaction. Without such interaction, humans lose the ability to "establish and sustain a sense of identity and to maintain a grasp on reality." Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel*

and Far Too Usual Punishment, 90 Ind. L.J. 741, 776 (2015). One individual who had been in isolation for almost twenty-five years described his confinement as a "slow constant peeling of the skin, stripping of the flesh." Lobel, *supra*, at 116. Senator John McCain, who spent more than two years in isolation as a POW in North Vietnam, described how solitary confinement "crushes your spirit and weakens your resistance more effectively than any other form of mistreatment." Atul Gawande, *Hellhole*, The New Yorker, Mar. 30, 2009, http://www.newyorker.com/magazine/2009/03/30/hellhole. And other statements by those who have spent time in solitary confinement are consistent with these accounts. *See, e.g.*, *Reassessing Solitary Confinement Hearing*, *supra*, at 321 ("I felt neglected and completely invisible. I felt like I didn't mean anything."); *id.* at 326 ("As the time went by and I remained in the gray box I degenerated even worse. I lost the will to live. I lost hope, even though I was scheduled to be released in a couple years. Depression overwhelmed me."); *id.* at 339 ("There's no describing the day to day assault on your body and your mind and the feelings of hopelessness and despair.").

In sum, the accounts of individuals who have spent extended periods of time in solitary confinement confirm what countless studies make clear: solitary confinement, especially long-term solitary confinement, is so inhumane and dehumanizing as to be excessive in relation to virtually any individual. It denies these individuals the "dignity" that the Eighth Amendment guarantees all individuals, even those who have committed heinous crimes. *Roper*, 543 U.S. at 560.

This Court should thus grant certiorari and hold that an excessive period of confinement after being

sentenced to death, especially when much of that time is spent in solitary confinement, violates the Eighth Amendment prohibition on cruel and unusual punishment.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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